



## Labour Relations in Canada in Light of Provincial Cleavages for Migrant Farm Workers

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### **Abstract:**

Despite the Seasonal Agricultural Worker and Temporary Foreign Worker programs existing under federal legal jurisdiction, provincial authority with respects to health, housing and labour codes encroaches upon many issues that are relevant to the lives of migrant workers. The asymmetrical standardization of various jurisdictions exacerbates a huge cleavage in the Canadian human rights regime in relation to migrant workers. Using an array of reports—that vary in their respective source bases from labour unions to academic and government publications—this paper examines inter-provincial differences in the aforementioned areas of issues to demonstrate that the federal/provincial division of powers acts as an impediment for the development of rights for temporary migrant workers under the Seasonal Agricultural Worker Program and Temporary Foreign Worker Program. To advance this argument, this paper also illustrates how various provincial governments have interacted with the Governments of Canada and Mexico to limit access to healthcare, housing and collective bargaining. It then promotes the notion that, in the absence of federal uniformity, the dispersed jurisdiction in these areas of issues allows the provinces leverage to experiment with different labour relations regimes; it asserts that although provinces are given room to differ from one another, some of them have attempted to systematically restrict the rights of migrants to housing, healthcare, training, and collective representation.

### **Résumé :**

Malgré les programmes pour les «travailleurs étrangers temporaires et les travailleurs agricoles saisonniers » qui existent sous la compétence fédérale, les autorités provinciales ayant trait à la santé, le logement, et les codes du travail empiètent sur plusieurs questions pertinentes à la vie des travailleurs migrants. La standardisation asymétrique d'un grand nombre de juridictions aggrave la grande scission dans le régime canadien des droits de l'homme vis-à-vis des travailleurs migrants. En consultant une grande variété de rédactions provenant de sources diverses telles que des syndicats et des publications académiques et gouvernementales, cet essai examine les différences interprovinciales afin de démontrer que la division de pouvoir entre le niveau fédéral et provincial agit comme obstacle pour les travailleurs migrants sous le programme. Pour avancer cet argument, cet essai illustre comment les gouvernements

provinciaux ont collaboré avec les gouvernements du Canada et du Mexique pour limiter l'accès aux médicaments, au logement et à la négociation collective. On promeut ensuite la notion que l'absence d'uniformité fédérale et la dispersion de juridiction permet aux provinces d'expérimenter avec différents régimes de relations de travail; bien que les provinces aient la chance de varier leurs normes, plusieurs d'entre elles ont tenté de limiter systématiquement les droits des travailleurs migrants au logement, aux médicaments, à l'entraînement et à la négociation collective.

Throughout the centuries, different forms of agriculture have developed with evolving forms of social relationships in the countryside characterized by differing institutional and administrative frameworks. This paper will examine recent social and institutional developments in the Canadian context with regards to a growing foreign migrant workforce. There currently exists a large body of research that focuses on seasonal farm migrants and issues that relate to their respective communities – namely, the Seasonal Agricultural Worker Program (SAWP) and the Temporary Foreign Worker Program (TFWP), which serve as the key programs under which migrant farm workers enter Canada. Through a methodological combination of firsthand accounts and federal guidelines, such literature presents an argument based on human rights, understandably, as both the SAWP and TFWP operate almost exclusively under federal jurisdiction. Despite the resonance of this argument, there is not much work focusing on the relationship between these groups of workers in the context of a federal provincial division of powers whereby various forms of standards are different amongst different provinces. Under the Canadian constitutional federal-provincial division of powers, provinces are endowed with regulatory powers in areas of housing, labour codes, and health policy—all of which embody some of the core policy areas that, according to much of the literature, adversely impact migrant farm workers.

This paper will present an argument that is fundamentally two-fold, with the latter building upon the former. Firstly, it will argue that the federal-provincial division of powers spawns a system of inter-provincial policy asymmetries in relation to the SAWP, and more generally to the TFWP. Secondly, this system of inter-provincial cleavages has an impact on employer-employee relations creating a dynamic that advantages the employer in the fields of health and safety, provincial labour laws, and housing. I will further illustrate how various

provincial governments have interacted with the Canadian court system, along with the Governments of Canada and Mexico to limit access to healthcare, housing and collective bargaining. This evidence will enable my argument against the possibility that provincial jurisdiction does not allow provinces to experiment with these policy areas without federal interference for the benefit of migrants workers. In concluding, I will provide regulatory recommendations that may be implemented.

### **The Temporary Foreign Worker and The Seasonal Agricultural Worker Program**

To begin to understand inter-provincial cleavages in relations to migrant labour in agriculture, we must first turn to existing federal institutions that permit their entry. The TFWP acts as the parent hub for all migrants entering Canada on a temporary basis. It encompasses multiple fields including the SAWP, which permits entry into Canada for agricultural labourers on a season-by-season basis.

The TFWP “help[s] employers meet their labour needs when Canadian citizens and permanent residents are not available.”<sup>1</sup> The purpose of this program is to allow migrants to enter into Canada and to fill up job positions when there is a labour market shortage. With an unemployment rate of 6.9%,<sup>2</sup> there are plenty of Canadian residents who can easily be re-trained for these low-skilled positions, effectively calling into question both the legitimacy and the necessity of this program. This contention is often coloured by the race to the bottom notion, as TFWP imports workers into an environment of legal vulnerability that exerts “downward

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<sup>1</sup> Government of Canada, "Hiring Agricultural Workers." Last modified September 25, 2013. Accessed November 2, 2013. [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/index.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/index.shtml).

<sup>2</sup> "Unemployment rate dips to 6.9% as fewer people look for work." CBC News, October 11, 2013. <http://www.cbc.ca/news/business/unemployment-rate-dips-to-6-9-as-fewer-people-look-for-work-1.1990794> (accessed November 2, 2013).

pressure on the working conditions of all workers”<sup>3</sup> within the sector. While the aforementioned argument is beyond the scope of this paper, this conceptualization of vulnerability will be addressed below and is important to keep in mind throughout this analysis.

The TFWP is structured for a variety of economic sectors, including agriculture, live-in caregivers, high skilled job or low skilled job.<sup>4</sup> The agricultural sector has four different streams in which employers can arrange to employ workers from abroad on a temporary basis. These include the Agricultural Stream, the Stream for Lower-skilled Occupations, the Stream for Higher-skilled Occupations, and the Seasonal Agricultural Worker Program.<sup>5</sup> Each has different subset conditions for the applicant workers abroad as well as for the employers hiring them. This essay will focus on the SAWP, as it is the most prominent program for the entrance of migrants into the agricultural sector.

The SAWP has its own sub-set of preconditions. The program itself operates under bilateral agreements with the governments of Mexico, Anguilla, Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, as well as Trinidad and Tobago,<sup>6</sup> whereby seasonal agricultural workers entering Canada under the SAWP must be citizens of one of the aforementioned countries. On their end, these governments are expected to maintain a pool of hireable workers,<sup>7</sup> and take care of documentation of the workers in their home country. These workers can labour on farms or greenhouses only in instances of primary agriculture where the produced crop is on a designated National Commodity List. This list includes farms that cultivate apiary products, fruits,

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<sup>3</sup> Carpentier, Marie, and Carol Fiset. Quebec. Commission des droits de la personne et des droits de la jeunesse. SYSTEMIC DISCRIMINATION TOWARDS MIGRANT WORKERS. 2011. 18. Print.

<sup>4</sup> Government of Canada, "Hiring Agricultural Workers." Last modified September 25, 2013. Accessed November 2, 2013. [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/index.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/index.shtml).

<sup>5</sup> Ibid

<sup>6</sup> Government of Canada, "Hiring Seasonal Agricultural Workers." Last modified October 21, 2013. Accessed November 2, 2013. [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/seasonal/index.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml).

<sup>7</sup> Ibid., Section 1

vegetables (excluding legumes), flowers, Christmas trees (including on-farm canning/processing and greenhouses/nurseries), sod, tobacco, bovine, dairy, duck, horse, mink, poultry, sheep, and swine.<sup>8</sup> In addition, it is important to note that these workers are only allowed entry for a period up to eight months and under the condition that they are provided with at least 240 hours of work upon entry.<sup>9</sup>

Legally, the employer is required to “provide [Temporary Foreign Workers in the SAWP] with free suitable housing”<sup>10</sup> that must be inspected by provincial, territorial or municipal bodies. The employer is furthermore required to “ensure that all [Temporary Foreign Workers in the SAWP] are registered for provincial/territorial health insurance as soon as they become eligible.”<sup>11</sup> The federal outline of employer requirements in the realm of health and safety demands that training be conducted under provincial guidelines.<sup>12</sup> Also, if these workers are to enter into a unionized environment, they are guaranteed union representation under the federal outline.<sup>13</sup> There are certain exceptions for British Columbia (BC) in regards to housing requirements,<sup>14</sup> and for Quebec when it comes to wage outlines.<sup>15</sup> We can already observe huge jurisdictional obligations that are placed on the provinces for maintaining these workers upon entering the country – despite this being a federal initiative. Before proceeding to further examining these cleavages, I will provide a brief outline of the social and labour rights that Canada has undertaken as part of international human rights regimes.

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<sup>8</sup> Ibid., Section 2

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., Section 3

<sup>14</sup> Ibid., Section 2

<sup>15</sup> Ibid., Section 3

The raw numbers of foreign temporary workers in Canada are quite shocking. From 2007 to 2011, Canada took in between 150 000 and 200 000 workers with the TFWP.<sup>16</sup> Temporary foreign workers outnumbered all other immigrants in the country every single year with the exception of 2010.<sup>17</sup> Out of this large proportion of temporary workers in the country, the SAWP contributed 23,930 workers in 2010 and continues to provide in and around that number. While these figures are a bit blanketed and do not account for regional derivation, they do, however, point to noted changes in immigration patterns within the country—shifts that will be addressed later in this paper.

With regards to provincial intake, Ontario leads any other province in SAWP workers as it takes in approximately 64% of total entrants.<sup>18</sup> While Ontario does take in the vast majority of SAWP applicants, this does not mean that the problems surrounding the SAWP only represent issues for Ontario; there is still a demand for SAWP workers all across Canada. Moreover, factors such as the agreement/consent of provinces to be part of the program are crucial to take into consideration. For example, the SAWP in BC, which initiated operations in 2004, consisted of almost more temporary workers in the province than permanent residents by 2009.<sup>19</sup> In terms of migration, also in BC, there was a decline in permanent residents by 3000 persons between 2005 and 2009 while there was an increase of 5000 temporary workers over the same period of time.<sup>20</sup> In other words, in terms of immigration volume, the SAWP is contributing to a shift in the types of immigrants entering the country. In the case of Quebec, we see that in 2010, 95.1%

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<sup>16</sup> Employment and Social Development Canada, "Evaluation of the Labour Market Opinion Streams of the Temporary Foreign Worker Program." Last modified July 26, 2013. Accessed November 3, 2013. [http://www.hrsdc.gc.ca/eng/publications/evaluations/skills\\_and\\_employment/2013/july.shtml](http://www.hrsdc.gc.ca/eng/publications/evaluations/skills_and_employment/2013/july.shtml).

<sup>17</sup> Ibid.

<sup>18</sup> Faraday, Fay. "Made in Canada How the Law Constructs Migrant Workers' Insecurity." 2012. 40. Print.

<sup>19</sup> UFCW. REPORT ON THE STATUS OF MIGRANT WORKERS IN CANADA 2011. 2011. 5. Web. <<http://www.ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf>>.

<sup>20</sup> Ibid.

of the temporary workers entered as agricultural workers or live-in caregivers.<sup>21</sup> Thus, even within the TFWP, SAWP workers are starting to contribute more to entrants. In this sense, the SAWP does not have a heterogeneous impact throughout Canada, but rather differs from province to province.

Pertaining to interplay within the political and economic legal regime, it is noteworthy that there is no labour dispute resolution mechanism built into the SAWP, even though formal labour contracts are signed between the worker and employer. While formally there are mechanisms whereby the employer can cancel the contract, the farm workers cannot do so without risking deportation. The only way in which farm workers from the Caribbean or Mexico can express grievances is through liaison and consular staff of their respective countries. They are however legally obligated within the parameters of the SAWP Operational Guidelines to “ensure the smooth functioning of the program for the mutual benefit of both the employers and the workers.”<sup>22</sup> In other words, this binding protocol obliges them to act as neutral arbitrators, which enhances the vulnerability of these temporary migrant workers as they cannot rely on the support of their home country for any cleavages in the labour relations process. They are placed in a situation where they are subject to varying provincial labour laws as well as to the willingness of domestic actors in collaborating and supporting them throughout this process.

### **International Human Rights Instruments**

There is an assortment of human rights regimes to which Canada is bound to via the United Nations (UN), the Organization of American States (OAS), and the International Labour

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<sup>21</sup> Carpentier, Marie, and Carol Fiset. Quebec. Commission des droits de la personne et des droits de la jeunesse. SYSTEMIC DISCRIMINATION TOWARDS MIGRANT WORKERS. 2011. 9. Print.

<sup>22</sup> Ross, Lois. North-South Institute. Migrant Workers in Canada: A Review of the Canadian Seasonal Agricultural Workers Program. Ottawa: 12, Web.



Organization (ILO). When analyzing particular employment conditions of temporary foreign workers, it is imperative to go back to these regimes as a legal benchmark since these international human rights regimes are generally thought of to represent the will of the international community through the articulation of international norms. By contextualizing these norms in light of the SAWP, we can take into account the limited rights that farm workers possess in their employment relations, as dictated by provincial rights frameworks, through adopting a perspective that encompasses a broader international normative framework.

Under the UN, Canada has signed and ratified the International Covenant on Economic, Social and Cultural Rights. Under Articles 7 and 8 of the Covenant, Canada is obliged to provide workers with “[f]air wages and equal remuneration for work”, “[s]afe and healthy working conditions”, the “right of everyone to form trade unions and join the trade union of his choice”, and the “right to strike”.<sup>23</sup> Moreover, Article 11 specifically guarantees the rights of “everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing”.<sup>24</sup> The Covenant also maintains self-inscribed clauses in Articles 5 and 25, which place the burden of compliance on the signing states and prevents the Covenant from being interpreted in any way which would deny to anyone the rights inscribed within it.<sup>25</sup>

Under the OAS regime, Canada has opted out of signing multiple hemispheric accords in relation to social and economic rights. However, under Article 44.c of the Protocol of Buenos Aires, which acts as an amendment to the Charter of the OAS, Canada is compelled to protect the “right to collective bargaining and the workers' right to strike”, as well as to ensure the “recognition of the juridical personality of associations and the protection of their freedom and

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<sup>23</sup> United Nations, "International Covenant on Economic, Social and Cultural Rights." Last modified January 03, 1976. Accessed November 2, 2013. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

independence”.<sup>26</sup> It is very clear that under these two basic treaties, to which Canada is a signatory, there is a manifest obligation to respect the basic rights of union representation, adequate wages, stable and sanitary housing, safe work condition and health care.

The ILO appears multiple times in the international labour rights literature in regards to migrant farm workers. Some scepticism is nonetheless warranted in referencing ILO conventions, as adherence to the ILO is non-compulsory and many countries have not ratified existing conventions.<sup>27</sup> Also, there is no ILO regulatory body that is equivalent to the mechanisms in the UN or the OAS judicial wing. There is however prevalence in referencing the ILO within the existing literature,<sup>28</sup> as it does set some sort of benchmark.

The Canadian Labour Congress and provincial affiliates have referenced ILO conventions to illustrate that provincial and federal governments operate on a policy of non-compliance vis-à-vis the international labour legal regime. This is specifically argued in the case of Convention 87 on the Freedom of Association and Protection of the Right to Organize, whereby the Canadian and various provincial governments have disregarded Articles 2, 3, and 11.<sup>29</sup> These articles frame syndicate autonomy in a sense that affects both domestic and temporary foreign workers. Various legal restrictions have been implemented on the rights enshrined in these articles.

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<sup>26</sup> Organization of American States, "PROTOCOL OF AMENDMENT TO THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES (B-31) "PROTOCOL OF BUENOS AIRES" ." Last modified February 27, 1967. Accessed November 2, 2013. [http://www.oas.org/dil/treaties\\_B-31\\_Protocol\\_of\\_Buenos\\_Aires.htm](http://www.oas.org/dil/treaties_B-31_Protocol_of_Buenos_Aires.htm).

<sup>27</sup> Castles, S. and Davidson, A. (2000) *Citizenship and Migration: Globalization and the Politics of Belonging* (Houndmills, Macmillan).

<sup>28</sup> Brubaker, R. (1992) *Citizenship and Nationhood in France and Germany* (Cambridge, MA, Harvard University Press).; Canefe, N. (1998) 'Citizens versus permanent guests: cultural memory and citizenship laws in a reunified Germany', *Citizenship Studies*, 2(3), pp. 519–44.; Castles, S. and Davidson, A. (2000) *Citizenship and Migration: Globalization and the Politics of Belonging* (Houndmills, Macmillan).

<sup>29</sup> Canadian Labour Congress. CLC Briefing Note. ILO Convention 87 on the Freedom of Association and Protection of the Right to organize Convention, 1948. Web. <<http://www.canadianlabour.ca/sites/default/files/pdfs/Briefing-Note-C87.pdf>>.

Another key convention that is often referred to in regards to migrant workers is the UN Convention on the Rights of Migrant Workers and Members of Their Families.<sup>30</sup> It does not operate under the ILO, but is a specific part of the UN regime and an organ set up to monitor migrant rights worldwide. While this treaty has the possibility to be robust, no advanced capitalist democracy in North America or Europe has even signed the treaty, let alone ratified it. Overarching international labour rights regimes that go beyond basic human rights concerns in regards to migrant temporary workers are not only toothless: they barely even exist in any sense, as there is a limited body of signatories to the treaties and corresponding enforcement mechanisms as mentioned above.

### **The Multifaceted Web of the SAWP**

Having gone over human and labour rights from an international standpoint, the following section will detail the relation of agricultural employers to the SAWP and migrant workers. These connections will provide the groundwork for examining employer-worker relations in the context of international legal obligations, the federal-provincial jurisdictional divide, and the asymmetrical jurisdiction among provinces.

There is a plethora of information pertaining to the scale of the farms that employ the temporary agricultural workers to be found in the Government of Canada's evaluation of the TFWP. This evaluation is commissioned by the government to analyze the programs in terms of productivity for its key stakeholders, which are the provincial governments, employers, and the federal government. As such, the evaluation ignores the workers themselves as key actors; it may *per contra* give us valuable insights on key trends and options of the stakeholders at hand.

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<sup>30</sup> "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families." December 18, 1990.

The evaluation conducted between 2007 and 2010 found a concentration of SAWP workers going to a few farms.<sup>31</sup> During the aforementioned timeframe, “20% of employers accounted for 71% of the positions requested”.<sup>32</sup> Meanwhile, requests from 2.9% of employers for 150 or more workers,<sup>33</sup> during the four-year period, accounted for 53% of total SAWP requests.<sup>34</sup> These figures clearly demonstrate that there is a concentration of employers who aim to hire the lion’s share of temporary workers. It is also essential to acknowledge that the evaluation itself doesn’t consider the tens of thousands of temporary foreign workers as stakeholders and thus, from this concentration, we can infer that the SAWP is designed to cater to the needs of agribusiness.

Canadian government evaluations do not generally release the information on those surveys, so it is difficult to get an accurate picture of just how big the farms are of those 2.9% of employers. Nevertheless, an educated guess can be made if we take the averages of workers needed per hectare of farmland in Canada: we get a figure of 0.05 workers per hectare.<sup>35</sup> This would mean that, for every hectare of farmland, less than one worker would be needed. If one worker is capable of working on 20 hectares of land and 150 workers are hired, the size of these farms should be evaluated at approximately 3,000 hectares or more.

This figure is of course a very general estimate as different regions in Canada as well as different industries may be more labour intensive than others, suggesting that these farms are in some cases smaller than our evaluation. However, the estimation’s cut off figure was set at 150

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<sup>31</sup> Employment and Social Development Canada, "Evaluation of the Labour Market Opinion Streams of the Temporary Foreign Worker Program." Last modified July 26, 2013. Accessed November 3, 2013. [http://www.hrsdc.gc.ca/eng/publications/evaluations/skills\\_and\\_employment/2013/july.shtml](http://www.hrsdc.gc.ca/eng/publications/evaluations/skills_and_employment/2013/july.shtml).

<sup>32</sup> Ibid., Section 3.1.1

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Nation Master, "Agriculture Statistics > Workers per hectare (most recent) by country." Accessed November 3, 2013. [http://www.nationmaster.com/graph/agr\\_wor\\_per\\_hec-agriculture-workers-per-hectare](http://www.nationmaster.com/graph/agr_wor_per_hec-agriculture-workers-per-hectare).

workers,<sup>36</sup> or over hired by this minority of farmer, implying that these farms are larger or more productive. Either way, we can infer from the large intake of workers to a minority of farms that these establishments have a high productive output and are economically quite large.

From the previous assessment we can also suspect the existence of a structural need for these workers by agribusiness. According to a survey of 455 employers who used the SAWP, 53% signified that they would have no other way of filling the position should it not have been for the program.<sup>37</sup> Additionally, approximately 97% of employers asked signified that they intended to hire again through the SAWP within the next 12 months.<sup>38</sup> This clearly indicates that these employers believe in a structural dependence of agribusiness on a constant flow of temporary migrant workers into Canada. As will be discussed below, this structural need is important to scrutinize as it has an outcome on labour relations policy in regards to provincial authorities.

We can now claim that there are small concentrations of farms that are very large and, in proportion to the amount of workers coming in, are quite productive. The owners of these farms also consider temporary migrant workers as an economic necessity to further private accumulations. It is also imperative to remember that these big agricultural businesses have huge leverage over the lives of these workers when they enter Canada as they are required to provide them with housing, transportation, and access to health services.

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<sup>36</sup> Employment and Social Development Canada, "Evaluation of the Labour Market Opinion Streams of the Temporary Foreign Worker Program." Last modified July 26, 2013. Accessed November 3, 2013. [http://www.hrsdc.gc.ca/eng/publications/evaluations/skills\\_and\\_employment/2013/july.shtml](http://www.hrsdc.gc.ca/eng/publications/evaluations/skills_and_employment/2013/july.shtml).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

## Provincial Labour Regimes

In the context of the temporary agricultural worker regime, provincial jurisdiction covers employment relations in multiple ways; the most clear of which are labour laws. Courts have generally maintained that provincial authorities retain control over labour legislation while, in a few very rare circumstances, federal authority may enter in effect vis-à-vis the Charter of Rights and Freedoms.<sup>39</sup> There is a clear institutional and legal divide in practical authority between provinces and the federal government in this respect. As provincial labour legislation differs from province to province so will the impact these laws have on temporary foreign workers.

Labour laws differ from province to province where they colour the labour relations regime for SAWP workers. Seeing that these provincial labour acts are asymmetrical, it is necessary to look at each province's legal cleavages in order to examine whether and how existing legislation at the provincial level fails to meet international standards for labour rights. For example, provincial labour laws in Ontario and Alberta function in different assortments of ways to restrict migrant farm workers' access to the rights they guaranteed within their contract and under the international normative framework mentioned above. In a general sense, however, provincial labour laws tend to exclude farm workers from key normative labour rights that govern areas such as hours of work, vacation pay, and overtime.

Ontario is a key case to look at as it takes in approximately 64% of SAWP workers.<sup>40</sup> In Ontario, temporary farm workers are legally forbidden to unionize given that they are not a party to the Ontario Labour Relations Act, nor are they permitted to associate, as they are not either a

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<sup>39</sup> Carpentier, Marie, and Carol Fiset. Quebec. Commission des droits de la personne et des droits de la jeunesse. SYSTEMIC DISCRIMINATION TOWARDS MIGRANT WORKERS. 2011. 10. Print.

<sup>40</sup> Faraday, Fay. "Made in Canada How the Law Constructs Migrant Workers' Insecurity." 40.

party to the Agricultural Employees Protection Act.<sup>41</sup> Considering this in light of a lack of embassy protection, these foreign workers have no right to collective mediation for any grievances during their stay. They were also legally excluded from health and safety legislation until 2006 and only received protection under the Occupational Health and Safety Act due to a United Food and Commercial Workers legal challenge. Even with access to these basic and fundamental rights, a climate of fear pervades temporary workers in the province as their job security is based on the “good-will” of their employer, which acts as a barrier to accessing these rights.<sup>42</sup> A 2010 research report conducted by the Centre of Excellence on Research and Immigration Settlement (CERIS) exemplifies this perfectly. They interviewed 600 SAWP workers as part of this report and nearly half of them responded that “working while sick or injured was common practice because of the fear of employer reprisal or repatriation” and that they “were ordered to work with chemicals and pesticides [while] they were not supplied the necessary protection such as gloves, masks, and goggles.”<sup>43</sup> Ontario migrant farm workers are also excluded from most of the provisions from the Employment Standards Act.<sup>44</sup>

In Quebec, temporary foreign agricultural workers are excluded from both the Act respecting labour standards and the provincial Labour Code, and are not covered by regulation pertaining to minimum wage.<sup>45</sup> In other words, they are excluded, much like workers in Ontario, from association and unionization. In terms of the migrant worker population in the province, there were 5, 730 workers entering via the SAWP or the Agricultural Stream of the TFWP as of

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<sup>41</sup> McLaughlin, Janet. *Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada*. Diss. University of Toronto, p 400. 2009. Web.

<sup>42</sup> Faraday, Fay. "Made in Canada How the Law Constructs Migrant Workers' Insecurity." 5

<sup>43</sup> UFCW. THE STATUS OF MIGRANT FARM WORKERS IN CANADA 2010-2011. 2011. Web.  
<[http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2244:2010-2011-migrant-farm-workers-report-published&catid=6:directions-newsletter&Itemid=6&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2244:2010-2011-migrant-farm-workers-report-published&catid=6:directions-newsletter&Itemid=6&lang=en)>.

<sup>44</sup> McLaughlin, Janet. *Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada*. Diss. University of Toronto, p 400. 2009. Web.

<sup>45</sup> Carpentier, Marie, and Carol Fiset. Quebec. Commission des droits de la personne et des droits de la jeunesse. SYSTEMIC DISCRIMINATION TOWARDS MIGRANT WORKERS. 2011. 22. Print.

2011, meaning that 85% of the workers entering the province are working on farms and 38% are entering via the SAWP.<sup>46</sup> While in Ontario there was a negative Supreme Court ruling regarding the ability of migrant farm workers to freely associate in light of existing protections under the Charter of Rights and Freedoms, Quebec government literature overtly calls the TFWP in the SAWP and Live-In Caregiver program discriminatory; albeit discriminatory with regards to the Quebec Charter that protects social rights.<sup>47</sup> The stark difference between Quebec and other governments is that the province tasked the “Commission des droits de la personne et des droits de la jeunesse” with making recommendations to the government regarding policy proposals to ameliorate the conditions of migrant workers. The reports of the Commission thoroughly condemn the TFWP, and the SAWP in particular, for its multifaceted discriminatory nature that contributes to social isolation as well as for the extensive lack of regulations.<sup>48</sup> While not overtly criticizing them, the report alludes to inter-provincial legal cleavages used to systematically limit migrant worker rights while posing the program as a gain for employer.

Alberta’s jurisdiction, much like Ontario and Quebec, prevents temporary farm workers from being unionized. Unlike Ontario, however, temporary migrant workers in agriculture have no rights to health and safety protection under the provincial labour regulation regime.<sup>49</sup> Overall, labour regimes differ from province to province. This division provides a patchwork system whereby temporary migrant workers are subject to situations where they remain uncertain of their rights and exempt from crucial social rights, as define in the section above. This also leads to questions arising due to a certain degree of politicization of these temporary farm workers’ human rights. For example, even though Ontario legislation was in clear violation of multiple

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<sup>46</sup> Ibid., 8

<sup>47</sup> Ibid., 22-23

<sup>48</sup> Ibid.

<sup>49</sup> UFCW. UFCW Canada Report on the Status of Migrant Farm Workers in Canada, 2006-2007. 2007. 5. Web. <<http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>>.



international conventions, after UFCW took the government to court and won the right for migrants to bargain collectively, the ruling Liberal regime appealed the decision. Part of this was under the slogan of not unionizing the family farm, a clear political message targeted at a key constituency. Withal, in the three aforementioned jurisdictions, differences give way to asymmetrical legal policies that are discriminatory to migrant workers pertaining to provincial labour law regimes. Although there is a consensus of legally perpetuated social exclusion, the asymmetry makes it difficult across the board to improve social position of these workers.

### **Housing, Hygiene, Health, and Enforcement**

Sociological and anthropological studies on the part of academics, like Tanya Basok<sup>50</sup> and Janet McLaughlin,<sup>51</sup> thoroughly document the experiences of migrant worker-employer relationships when it comes to claiming some of the guaranteed rights accorded to workers in the SAWP. Their studies are concentrated in Ontario, Leamington and the Niagara region specifically and their work speaks volumes to the complex interplay of reasons why farmers do not always provide their workers with adequate health and safety environments as well as housing. Their research demonstrates many cases where farmers did not provide the guaranteed quality housing conditions, while in many instances they also ignored health and safety requirements, compelling their workers to do tasks without safe equipment or protection. Part of the reason this unequal relationship exists is because isolated rural communities rarely have any enforcement in terms of health standards on the farm. Provincial services generally do not intervene and federal authorities are absent owing to the area, which is beyond nominally federal jurisdiction. An

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<sup>50</sup> Basok, Tanya. "Post-national Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada." *Citizenship Studies*. 8.1 (2004): 47-64. Web. 18 Dec. 2013.  
<<http://dx.doi.org/10.1080/1362102042000178409>>.

<sup>51</sup> McLaughlin, Janet. *Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada*. Diss. University of Toronto, 2009. Web.

astute fear of deportation on the workers end is coupled with this lack of enforcement should they come forward making complaints and assessing their rights. Moreover, many of the workers in the SAWP are non-Anglophones and may therefore have difficulty understanding the regulatory measures and even more so to file complaints.<sup>52</sup> In short, a lack of provincial regulation in Ontario together with the implicit threat of coercion through deportation and an eclectic fear of complaining, these workers are indubitably disadvantaged in their relationship with their employer.

Although there are systems in place whereby these workers do get benefits, there are many instances where they are not made aware of what they are entitled to. One survey conducted in Ontario shows that 70% of workers didn't feel they had enough support in accessing their workers' compensation, that 72% felt the same way about their parental benefits and that 58% felt they knew too little about their healthcare benefits.<sup>53</sup> Those who did feel comfortable with their knowledge about specific benefits reported learning from a migrant support agency rather than their employers or a government official from their host nation, nation of origin, or the province of Ontario. In many cases, the provincial and federal governments don't provide easy access to information regarding migrant rights like housing and workplace safety so workers remain unable to access these resources further contributing to their alienation.

In British Columbia, a 2008 report by the Canadian Centre for Policy Alternatives notes that while regulation has improved for SAWP workers in regards to workplace hygiene and

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<sup>52</sup> Ibid., 415

<sup>53</sup> Ibid., 413

work related illnesses, there is an evident lack of provincial enforcement of the existing laws.<sup>54</sup> While the provincial Workers' Compensation Board (WCB) extended health and safety regulation to farm workers that closed the gap between them and the rest of the workforce in 2005, issues like eating in pesticide ridden workplaces without employers conforming to regulations prohibiting the practice is still a concern due to lack of enforcement.<sup>55</sup> This report indicates that workplace injuries occur at a rate of 15% in the agricultural sector above the norm for the province;<sup>56</sup> conceding that because of the isolated nature of the farms, the rarity of reporting of injury, intimidation of employers, lack of understanding of their rights, and language barriers, the actual percentage is likely to be much higher for migrant farm workers. Furthermore, budget cuts to the WCB saw a dramatic decrease in inspections and prevention orders.<sup>57</sup> It is interesting to note that while the aforementioned report notes that BC should "be applauded" for the "parity in the rules between farm workers and other BC workers",<sup>58</sup> it cites a lack of regulatory enforcement as a key issue concerning hygiene and workplace health systems. While there is a stark, asymmetrical, difference in rights accorded to migrant farm workers in Ontario and BC, enforcement and education of contractually guaranteed rights remain key issues where both jurisdictions are failing within the framework of the federal SAWP.

This structural disadvantage is, in part, manifested in the asymmetrical nature of regulatory authority of different provinces whereby workers find themselves exempt from different protective legislations on account of provincial variability. This is re-enforced by the lack of a counterweight to the pressures of employers, be it via state or collective mechanisms.

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<sup>54</sup> Fairey, David, Christina Hanson, et al. Canadian Centre for Policy Alternatives. ECONOMIC SECURITY PROJECT REPORT. CULTIVATING FARMWORKER RIGHTS. Canadian Centre for Policy Alternatives, 2008. 27-30. Web.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

As mentioned before certain provincial authorities, the federal state and often the home countries perpetuated a situation through which migrant farm workers sit in a disadvantaged position vis-à-vis their employers. It is not that these three levels of state structures impede progress at the bargaining table in so much as they perpetuate a situation where there is no bargaining table to facilitate enforcement of guaranteed rights and the possibility of attaining more rights. In jurisdictions like BC where the right of free association is maintained, budget cuts come in as an impeding factor of states regulatory capacity to improve health and safety as well as housing standards. Legal asymmetry creates detailed and localized barriers for this migrant workforce in their capacity to access standardization. On the workers part, the lack of education pertaining to their rights further exacerbates their social vulnerability and perpetuates a situation whereby these workers are placed in disadvantaged, unsafe and unhealthy workplace situations at the whims of their employers. Who is supposed to educate them? The provinces? The consulates? The employers? The federal government?

### **Successes Within Federalism**

One could, however, make a contention that runs counter to the hypothesis that provincial jurisdiction over health, safety, and labour laws are being detrimental to the preservation of the human rights of these migrant workers. The asymmetrical implementation of SAWP in the context of Canadian federalism gives the provinces a certain breathing room to design policy that successfully engenders the capacity of this socio-economic group to access their rights.

Manitoba is a clear case where asymmetrical jurisdictional governance has led to some success. Migrant farm workers are included in the province's Employment Standards Code and The Worker Recruitment and Protection Act, which are some of the most equalizing pieces of

legislation for agricultural workers in Canada.<sup>59</sup> Manitoba is recognized by independent observers as having some of the best mechanisms in place to facilitate the enhancement of migrant rights.<sup>60</sup> They have also institutionally been attempting to improve protections of migrant workers within their jurisdiction. Despite legal parity among migrant workers with non-migrant workers, migrant workers still face adversity in the workplace. There have been cases where migrant workers are paid by the amount of vegetables they harvest, resulting in a salary that falls illegally below the province's minimum wage.<sup>61</sup> Even in the brightest of circumstances where protective measures have been willingly instituted by the government, issues relating to enforcement have arisen in Manitoba.

One must also keep in mind that this is just one province where laws have been, in some sense, constructed to defend these workers. Manitoba is the exception from the general rule. If we take Canada as a whole, which only makes sense as these workers can be brought into just about any province, labour laws along with health and housing policy are implemented on this community in an asymmetrical capacity that by and large affects these migrant workers in a negative capacity.

We can also consider these migrant farm workers as existing in the process of capital accumulation. They themselves do not have any form of elected representation at any level in Canada. In provinces where the majority of migrants enter, they are barred from collective bargaining. Their host countries are also mandated to provide Canadian agribusiness with a pool of workers who consequently lack a certain sense of job security; should they refuse to do unsafe

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<sup>59</sup> Manitoba. Employment Standards. Guide to Workplace Rights and Protections for Foreign Farm Workers in Manitoba, Canada. Winnipeg: , Print.

<sup>60</sup> Canadian Council For Refugees. Report Card Migrant Workers in Manitoba. Web. <[http://ccrweb.ca/en/system/files/mb\\_report\\_card.pdf](http://ccrweb.ca/en/system/files/mb_report_card.pdf)>.

<sup>61</sup> Zacharias, Bethany, and Amanda Thorsteinssen. "Migrant workers 'invisible'." Winnipeg Free Press[Winnipeg] 01 05 2013, n. pag. Web. 18 Dec. 2013. <<http://www.winnipegfreepress.com/local/migrant-workers-invisible-185736992.html>>.

work, they could be deported. Their employers on the other hand may or may not belong to political organizations that lobby for their interests as farmers and employers. The employers in this instance also enjoy full rights of citizenship in Canada and can vote, as well as exert pressure on any level of government to align with their self-interests. The structural disparity between the bargaining powers of these two groups is stark. In instances like Manitoba, where the capacity of provincial political actors to create and enforce regulations and the capacity of agribusiness to derive surplus value from the labour of their migrant workers, the mechanisms for the protection of the human rights of these migrant farm workers can flourish. When the structural power of farm owners outweighs that of the migrant workers, the farmers have the ear of the provincial political elites, and rights do interfere with the accumulation of capital of these farmers, then we shall see human rights come in as a political second to the generation of profit. Of course one must also figure in the flows of migrant farm workers to different provinces as well as the size of the businesses employing these farm workers into the equation to further the understanding of the strength of the workers vis-à-vis the employer vis-à-vis the province.

### **Blacklisted Workers & “Naming”**

Another key issue that doesn't directly fit into the provincial cleavage argument, but which has an impact on the social exclusion of the workers themselves in Canadian society as well as a direct impact on employer-employee relations, is the process of naming workers and periodic blacklisting. Employers can request specific SAWP workers who have worked for them in the past, season after season. While this does provide select workers with a certain sense of job security, it also perpetuates a sense of employer dependence and subservience. Workers who are good, willing to illegally work overtime and don't complain get hired back; workers who

support unions or ask for guaranteed rights are blacklisted and workers who are caught up in the middle are most often too intimidated to speak out. This is characterized in a BC legal case where migrant workers opted for a formal complaint at the provincial labour relations board, citing that they were denied entry back into their workplace because they supported the unionized environment for which they were blacklisted via collusion between the Mexican government and local employers.<sup>62</sup> The cycle of “perpetual recruitment”<sup>63</sup> in the SAWP at the federal and international levels affects the employer-employee relation that gets legally manifested at the provincial level. There is also a point to be made from the dreadful legislative environment coupled with dismal enforcement mechanisms at the provincial level, which incites workers to push for their rights via trade unions. Sadly, the response to this is a direct clamp down of their capacity to work because of their socially vulnerable status within the territorial limits of the country.

## **Concluding Thoughts**

### *Societal Implications of Labour*

The development of the SAWP and the TFWP in general marks a staunch shift in immigration and labour policy within Canada. In BC alone, there was an increase of 120% in temporary resident workers living in the province from 2005 to 2009.<sup>64</sup> As TFWs increase in proportion, SAWP workers all across the board are on the rise, we are seeing a system of “temporariness”<sup>65</sup> being perpetuated with the most vulnerable sector vested within the SAWP. While recent studies

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<sup>62</sup> Faraday, Fay. "Made in Canada How the Law Constructs Migrant Workers' Insecurity." 75.

<sup>63</sup> Ibid.

<sup>64</sup> UFCW. REPORT ON THE STATUS OF MIGRANT WORKERS IN CANADA 2011. 2011. 5. Web. <<http://www.ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf>>.

<sup>65</sup> Rajkumar, Deepa, Laurel Berkowitz, et al. "At the temporary-permanent divide: how Canada produces temporariness and makes citizens through its security, work, and settlement policies." *Citizenship Studies*. 16.3-4 (2012): 483-510. Print.

of immigration, multiculturalism,<sup>66</sup> social inclusion,<sup>67</sup> and their relations to the Canadian labour market focus on status designations of permanency,<sup>68</sup> the area of analysis in terms of political economic shifts and its legal as well as societal implications needs to be placed on this fast growing group of migrant workers and the paradox they find themselves in. The nature of the Canadian federal state has clearly not worked in any way to favour these workers as a group. At the federal level, the SAWP “has been incredibly effective in ensuring that workers contribute to the Canadian social contract, but rarely draw from it,” thus shifting the cost to “the workers, their families and communities.”<sup>69</sup> The provincial legislative asymmetry has perpetuated the vulnerability of these workers through piecemeal legal exemptions from standardization and lacks in adequate enforcement.

### *Fixing Problems*

It is quite clear that the SAWP, and the TFWP in a more general sense, are contributing to the changing face of Canada in terms of a shift in migrants and labour policy. These programs are multifaceted and rooted in international, national, provincial, local, and point of production political dynamics. What we can discern is that differing provincial cleavages whether through the lack of enforcement in areas of health and safety or asymmetrical implementation of labour standards have put these workers in a disadvantaged position within their work environment. This disadvantaged position can be categorically understood as one where basic guaranteed

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<sup>66</sup> Harder, Lois, and Lyubov Zhyznomirska. "Claims of belonging: Recent tales of trouble in Canadian citizenship." *Ethnicities*. 12.3 (2012): 293-316. Print.

<sup>67</sup> Wright, Matthew, and Irene Bloemraad. "Is There a Trade-off between Multiculturalism and Socio-Political Integration? Policy Regimes and Immigrant Incorporation in Comparative Perspective." *Perspectives on Politics*. 10.1 (2012): 77-95. Print.

<sup>68</sup> Heibert, Daniel. "Winning, Losing, and Still Playing The Game: The Political Economy of Immigration in Canada." *Tijdschrift voor Economische en Sociale Geografie*. 97.1 (2006): 38-48. Print.

<sup>69</sup> McLaughlin, Janet. *Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada*. Diss. University of Toronto, 2009. 397. Web.



rights are routinely and brazenly violated simply because the employer can do so. There is considerable room for improvement on the part of many of the provinces in these two aforementioned respects. Possibilities lie in and of the provinces taking initiative to improve the lot of these workers through increased inspection funding or various systems integration approaches to sync information to federal authorities, or even in bringing protective legislation up to par with other sectors of industry. Since the crucial starting point for the SAWP is at the federal level, the federal government can take initiative to enforce some degree of minimum standardization as it has done so with healthcare. It can take the approach of provincial quotas to regulate the market supply of these workers in exchange for improved legislation or increased protections, or it can even introduce other incentives. Point being, there are opportunities at the level of major provincial and federal government players to overcome regulatory barriers that ultimately infringe upon the rights of these workers.

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